In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 906

JOHN W. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 367 F. 2d 633.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1966. By order of Mr. Justice Fortas, the time for filing a petition for a writ of certiorari was extended to and including December 27, 1966, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether recordings of conversations, which were overheard with the consent of one of the parties, were properly admitted in evidence.

244-770—67

2. Whether a pre-trial motion for inspection of recordings was properly denied.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to defraud the United States by preparing a false report of uncollectible taxes and of conspiracy to solicit a bribe.[1] He was sentenced to concurrent terms of imprisonment for three years on each count (R. 7–11, 865–866). The court of appeals affirmed.

In the fall of 1964 the delinquent payroll tax account of Anita Chue, Inc., was assigned to petitioner, a revenue officer in the collection division of the Boston collection area (R. 24, 131–132). On December 11, the taxpayer's attorney, Mr. Benjamin Dwork, explained to petitioner that the restaurant operated by the corporation had been sold and that approximately $8,000 had been placed in an escrow account for the payment of debts. Petitioner stated that the taxes owed plus penalties amounted to about $18,000. He suggested that Dwork deduct the attorney's fee due to his firm and pay the balance on the tax account. Dwork said that he would be willing to forego his fee if the entire sum held in escrow would discharge the tax liability. Petitioner answered that this was ridiculous, and that if Dwork's account of corporation

[1] Petitioner's group supervisor, Lawrence Chandler, was tried jointly with him. Chandler pleaded guilty at the close of the government's evidence, and was sentenced to eighteen months' imprisonment.

finances was correct, the whole liability could be written off. He directed Dwork to send him a check together with a completed form and letter explaining that the corporation held no assets (R. 35–37).

The following week, Dwork wrote a check to his law firm for $1,860.75 and sent a check for the balance of $4,000 to petitioner (R. 37–38).[2] On December 29, 1964, petitioner saw Dwork at his office. He said that their conversation was confidential and asked if the place was "bugged." He said he could recommend that the tax be written off if a financial statement in line with a resumé which he had prepared were signed. He said he would return the check for $4,000, and suggested that Dwork take a fee of $1,000 and offer $3,000 to the Internal Revenue Service as a compromise settlement (R. 40–42).

Immediately after this conversation, Dwork went to the office of the United States Attorney. Two inspectors for the I.R.S. were called in. At their request, Dwork agreed to act as if he were willing to pay a bribe. He consented to the installation of a Fargo radio transmitter in his office, with wires extending to a vacant room in the suite, and to the installation of a similar device in his car (R. 45, 51–53, 234–235, 238–244, 329–330). He also authorized I.R.S. representatives to attach an induction coil device to a telephone extension in the office library. By pressing a buzzer, Dwork could notify them to listen in on any conversations with petitioner (R. 45, 52, 242–243, 329–331).

[2] Dwork had learned that the exact amount in the escrow account was only $5,860.75 (R. 36).

On December 31, 1964, petitioner told Dwork over the telephone to "forget" the $4,000 still in the escrow account (the check in that amount not having been cashed) and to claim that there were no assets, suggesting that administrative costs could be invoked to cover such assets as existed (R. 48–51). On January 4, 1965, petitioner returned the $4,000 check to Dwork's office, saying that it had not been officially noted anywhere, and that the $3,000 payment should be in cash. He assured Dwork that if the deal did not go through, this payment would be returned. It was agreed that the cash would be delivered at the parking lot of a Howard Johnson restaurant (R. 53–56). A listening device on the same frequency as the transmitter placed in Dwork's car was installed in a residence adjoining the parking lot with the consent of the occupant (R. 241). At the appointed time, Dwork delivered $3,000 in marked bills, which had been supplied by the I.R.S. to Dwork (R. 58–60). Agents in the neighboring residence observed their movements and heard the conversation by means of the Fargo device (R. 241–242).

Petitioner was observed on January 7, 1965, driving with his supervisor, co-defendant Chandler, from a motel to the I.R.S. office (R. 557–558). Chandler was followed to a men's clothing store, where he made several purchases and paid for them with a one hundred-dollar bill. He was placed under arrest, searched and $1,400 of the marked currency was found on his person. The bill received by the store also proved to be part of the marked money (R. 592–594, 610, 614). Recordings of the conversations between petitioner

and Dwork, introduced in evidence, corroborated Dwork's testimony (R. 331–352, 431–439). The records of the I.R.S. showed no receipts of the delinquent account (R. 135–138).[3]

ARGUMENT

1. The various means employed in the surveillance of petitioner's efforts to obtain a bribe from a taxpayer were proper. Recording particular conversations between petitioner and Dwork which related to the corrupt plan was a proper means of corroborating the account given by the attorney. *Lopez* v. *United States,* 373 U.S. 427; *Osborn* v. *United States,* No. 29, this Term, decided December 12, 1965.[4]

It was permissible to listen to and to tape, with the consent of the taxpayer's attorney, telephone con-

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[3] Petitioner testified in his own behalf that co-defendant Chandler told him to play along with petitioner (R. 670), to return the check and to see if Dwork would pay cash (R. 688, 699), and that he delivered the entire contents of the envelope given to him by Dwork to Chandler (R. 707). Chandler testified in rebuttal that he did not instruct petitioner to play along with Dwork (R. 822) or to return the $4,000 check (R. 819). He stated that the amount of money delivered to him by petitioner was $1,500 (R. 820–821).

[4] Petitioner also complains that a microphone was placed in a metal post of the cubicle Chandler occupied at the office of the I.R.S. (Pet. 7). No tapes of conversations thus recorded were introduced in evidence. In any event, the circumstances would justify the Internal Revenue Service in resorting to this measure. No violation of any local statute was involved, inasmuch as the Service had the exclusive control of the premises. Massachusetts General Laws, c. 272, sec. 101; *In re Ruby*, 328 Mass. 542, 105 N.E. 2d 234. And, in any event, petitioner plainly has no standing to object to violations *vis-à-vis* Chandler.

versations he engaged in with petitioner. *Rathbun* v. *United States,* 355 U.S. 107; *Carnes* v. *United States,* 295 F. 2d 598 (C.A. 5), certiorari denied, 369 U.S. 861; *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *Blanchard* v. *United States,* 360 F. 2d 318, 320–321 (C.A. 5); *Glacy* v. *United States,* 361 F. 2d 31 (C.A. 1), certiorari denied, 385 U.S. 831; *Cooper* v. *United States,* 365 F. 2d 246 (C.A. 6), pending on petition for certiorari, No. 928 Misc. Similarly, there was no impropriety in listening to and recording conversations by means of devices installed in the office and vehicle of the taxpayer's attorney with his consent. *United States* v. *Beno,* 333 F. 2d 669 (C.A. 2), certiorari denied, 379 U.S. 880; *United States* v. *Kabot,* 295 F. 2d 848 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Edwards,* 366 F. 2d 853 (C.A. 2).

Nor was there any violation of the principles of *Massiah* v. *United States,* 377 U.S. 201, and *Escobedo* v. *Illinois,* 378 U.S. 478. Those decisions accorded petitioner no right to be arrested at the first point in time when the evidence was sufficient to show probable cause. *Hoffa* v. *United States,* No. 32, this Term, decided December 12, 1966, slip opinion pp. 16–17. The government was under no duty to advise petitioner of his constitutional rights to remain silent or have counsel at the moment that he was engaged in the commission of the offense. *Grier* v. *United States,* 345 F. 2d 523 (C.A. 9); *Battaglia* v. *United States,* 349 F. 2d 556 (C.A. 9); *Garcia* v. *United States,* 364 F. 2d 306 (C.A. 10).

2. Before trial petitioner moved for pre-trial discovery of the tapes. The motion was denied without prejudice. It was not thereafter renewed at trial. There was no effort to have the devices examined by an expert during the trial, although ample opportunity existed. Nor was the accuracy of the tapes questioned during petitioner's extensive testimony. The other party to the conversations, the taxpayer's attorney, was interviewed by the defense before trial (R. 61). Hence there was plainly no surprise in the presentation of the government's case. Under the circumstances, petitioner's present claim that the denial of his pre-trial motion for discovery hampered his defense is unsound. In addition, the issue asserted here has no future significance because the recent amendments to Rule 16 of the Federal Rules of Criminal Procedure appear to control future cases involving this question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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